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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA- WESTERN DIVISION**

LES GAPAY, an individual;

Plaintiffs,

v.

WAL-MART STORES, INC., a
Corporation; DOES 1 through 100,
inclusive,

Defendants.

CASE NO. 2:15-CV-09305 JAK
(RAOx)

**PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION TO
TRANSFER VENUE PURSUANT
TO 28 U.S.C. §§ 1404(A)
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

Hearing Date: March 7, 2016
Courtroom: 750
District Judge: Hon. John A. Kronstadt
Magistrate Judge: Hon. Rozella Oliver
Complaint Filed: November 2, 2015
Trial Date: Not Set

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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3 **I.**

4 **INTRODUCTION**

5 Defendant WAL-MART STORES, INC. (hereinafter "Defendant") files the instant
6 motion seeking to transfer the matter to Montana. However, Plaintiff Les Gapay (hereinafter
7 "Plaintiff"), the individual who has suffered as a result of this incident, resides in California.
8 He has no plans to return to Montana and no real connection to the state.

9 U.S.C. § 1404(a) takes into consideration the Plaintiff's right to choose where to file his
10 or her lawsuit. In this case, Plaintiff has chosen California. Additionally, while many of the
11 witnesses are located in Montana, there are several witnesses in California, for example
12 Plaintiff and his treating physicians.

13 For these reasons, the Court should deny Defendant's motion.

14 **II.**

15 **STATEMENT OF FACTS**

16 On August 24, 2014, Plaintiff was in Montana on a trip. He was considering
17 relocating to Montana and had gone there in order to determine if it was a good fit. (Complaint
18 ¶4;19). On the evening of August 24, 2014, at approximately 11:00 pm Plaintiff was walking
19 out of Walmart located at 3555 Mullan Road in Missoula, Montana. (Complaint ¶4-5). Sean
20 Mareau was in Walmart with two other individuals, Lehner and Thomas. (Complaint ¶11).
21 The three of them were shoplifting from Walmart. (Complaint ¶12). Upon exiting the store,
22 Lehner approached Plaintiff and asked him to shake his hand. (Complaint ¶6). Plaintiff
23 declined and Lehner began punching him in the chest. (Complaint ¶6). Plaintiff told Lehner he
24 was going to call the police and reached for his cell phone. (Complaint ¶7). Sean Marceau then
25 ran up behind Plaintiff and began punching him in the right eye. (Complaint ¶8). Marceau
26 pushed him down and ran off. (Complaint ¶9). As Plaintiff lay on the pavement, Lehner and
27 Thomas returned and Lehner began kicking Plaintiff in the ribs and attacking a bystander.
28 (Complaint ¶10).

1 Plaintiff immediately experienced severe pain, vision loss and bleeding in his right eye.
 2 (Complaint ¶ 8). There were no security guards inside Walmart, outside of Walmart, or its in
 3 parking lot. (Complaint ¶13). This particular Walmart had a history of violence including
 4 numerous assaults, batteries and other violent crimes that have taken place in the parking lot
 5 and immediate vicinity. (Complaint ¶14). Defendant knew or should have known that there
 6 was a high risk of violence at Walmart and in its parking lots. (Complaint ¶ 16). Defendant
 7 should have known of the risk posed by Thomas, Lehner, and Marceau who were actively
 8 engaging in criminal activity inside Walmart just prior to attacking Plaintiff. (Complaint ¶ 17).
 9 Now, Plaintiff is blind in one eye. (Complaint ¶ 15). Plaintiff has undergone one surgery
 10 and will need another surgery to have the damage eye removed and a prosthetic implanted.
 11 (Complaint ¶ 15). He is at risk for complete blindness. (Complaint ¶ 15).

12 III.

13 STANDARD OF REVIEW

14 Pursuant to 28 U.S.C. § 1404(a) for the convenience of parties and witnesses, in the
 15 interest of justice, a district court may transfer any civil action to any other district or division
 16 where it might have been brought or to any district or division to which all parties have
 17 consented. 28 U.S.C. § 1404(a) is intended to place discretion in District Court to adjudicate
 18 motions for transfer according to individualized, case-by-case consideration of convenience
 19 and fairness; motion to transfer under § 1404 thus calls on District Court to weigh number of
 20 case-specific factors. *Stewart Org., Inc. v Ricoh Corp.*, 487 U.S. 22 (1988).

21 Convenience of parties and witnesses did not weigh in favor of transfer under 28 U.S.C.
 22 § 1404(a) where moving party asserted that witnesses it needed to call and much of evidence
 23 was located in different forum, but did not contend that forum selected by plaintiff wherein
 24 defendant maintained its place of business was inconvenient forum and where plaintiff
 25 asserted that witnesses it would need to examine were located in chosen forum. *Federal*
 26 *Deposit Ins. Corp. v. Citizens Bank & Trust Co.*, 592 F.2d 364 (7th Cir. 1979), cert denied,
 27 444 U.S. 829.

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1 IV.

2 ARGUMENT

3 Plaintiffs are given the right to choose where to file their lawsuit. While this right is not
4 absolute it does deserve consideration, even if other venues are available. "28 U.S.C. § 1404(a)
5 was not intended to defeat plaintiff in right of bringing his action in such forum as he deemed
6 proper, and wherever possible, consideration ought to be given to choice of his forum." *Walter*
7 *v. Walter*, 235 F.Supp. 146 (W.D.P. 1964). While the instant action could have been filed in
8 Montana, Plaintiff has no connection to Montana. He does not currently reside there and has
9 no intention of returning. Rather, Plaintiff resides in Riverside, California. Defendant in this
10 case does business all over the country including Montana and California. It was Plaintiff's
11 choice to bring this action in California.

12 "For the convenience of parties and witnesses, in the interest of justice, a district court
13 may transfer any civil action to any other district or division where it might have been brought
14 or to any district or division to which all parties have consented." 28 U.S.C. § 1404 (a) . While
15 there are witnesses in Montana there are also witnesses in California. Plaintiff and several of
16 his treating physicians reside in California. Thus, depositions will have to be conducted in
17 California regardless of where the action is venued. It is in the interest of Plaintiff and some of
18 the witnesses, his treating physicians in California, that the action be venued in California.

19 V.

20 CONCLUSION

21 Based on the foregoing, Plaintiff respectfully requests that the Court deny the instant
22 motion.

1 DATED: December 28, 2015

GIRARDI | KEESE

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4 By: /s/ Nicole F. De Vanon

5 NICOLE F. DE VANON

6 Attorneys for Plaintiff
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